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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ELLIS C. STEVENS, III, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether petitioner was denied an essential element of his due process right to be represented by civilian counsel when the military judge denied the petitioner's continuance request that would allow that representation to continue?

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	9
Appendix A	1a
Appendix B	2a

TABLE OF AUTHORITIES

Cases:

Chandler v. *Fretag*, 348 U.S. 3, 99 L.Ed. 3, 75 S.Ct. 1 (1954)	8
Morris v. *Slappy*, 461 U.S. 1, 75 L.Ed. 2d 610, 103 S.Ct. 1610 (1983)	5, 6, 7
Powell v. *Alabama*, 287 U.S. 45, 77 L.Ed. 45, 53 S.Ct. 55 (1932)	8
Ungar v. *Sarafite*, 376 U.S. 575, 11 L.Ed. 2d. 921, 84 S.Ct. 841 (1964)	7
United States v. *Kinard*, 21 U.S.C.M.A. 300, 45 C.M.R. 74 (1974)	5
United States v. *Montoya*, 13 M.J. 268 (C.M.A. 1982)	5
United States v. *Stevens*, 27 M.J. 626 (A.F.C.M.R. 1988)	1, 4
United States v. *Stevens*, __M.J.__ (C.M.A. 1989)	1
United States v. *Thomas* 22 M.J. 576 (C.M.A. 1986)	5

Statutory Authorities:

10 U.S.C. § 827(b) (Supp. III 1985)	6
10 U.S.C. § 838(b) (Supp. III 1985)	5, 7
10 U.S.C. § 840 (Supp. III 1985)	5
10 U.S.C. § 867(h) (Supp. III 1985)	1
28 U.S.C. § 1259(3) (Supp. III 1985)	1

Miscellaneous: Page

Manual for Courts-Martial 1984

Rules for Courts-Martial 506 6

Rules for Courts-Martial 602 7

Article 27(b), U.C.M.J. 6

Article 38, U.C.M.J. 5, 7

Article 40, U.C.M.J. 5

Air Force Regulations

AFR 111-1, 1984 11

AFR 111-1, 1988 11

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No.

ELLIS C. STEVENS, III, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Ellis C. Stevens, III, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in this case.

OPINION BELOW

The opinion of the United States Court of Military Appeals is reported at __ M.J. __ (C.M.A. 1989) (Appendix A). The original decision of the United States Air Force Court of Military Review is published at 27 M.J. 626 (A.F.C.M.R. 1988) (Appendix B).

JURISDICTION

The decision of the United States Court of Military Appeals was entered on February 21, 1989. The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h)(Supp. III 1985) and 28 U.S.C. § 1259(3)(Supp. III 1985).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides: "No person shall be . . . deprived of life, liberty, or property without due process of law. . . ."

The Sixth Amendment of the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy. . .the assistance of counsel for his defence. . . ."

STATEMENT OF THE CASE

On November 28, 1986 and January 8, 9, and 10, 1987, petitioner was convicted by general court-martial at Norton Air Force Base, California on charges of indecent assault and conduct unbecoming an officer and a gentleman (wrongfully and dishonorably approaching and touching a wife of an enlisted service-member). He was also charged with rape but was found not guilty of that offense. It was a fully litigated trial.

Petitioner's trial was initially set for September 16, 1987. The defense requested a 23 day delay until October 9. The prosecution then requested an 18 day delay from October 9 to October 27. Also on October 9, two additional charges were preferred against the appellant. An Article 32 hearing was conducted the following day, October 10. On October 27, the defense requested a 31 day delay in trial until November 20. The additional charges were referred to trial November 12, (23 days after the October 27 trial date).

Most significant to petitioner's trial was that while the additional charges were pending, appellant retained a civilian criminal attorney to represent him. Prior to this he had military counsel assisting him. With the new offenses being charged, petitioner saw a need to retain civilian counsel.

On November 10, 1986, appellant's newly retained civilian counsel contacted Lieutenant Colonel David Orser, the detailed military judge and requested a continuance of the trial to early February 1987. (R. 2). Civilian counsel followed that initial contact with a November 14, 1986 letter specifically explaining the basis for the request for continuance. (App. Ex. 1). He also contacted trial counsel by telephone on November 13 informing him of the request. (R. 11). A few days later, on November 17, civilian counsel discussed the issue on the phone with the detailed military judge. (R. 2). On November 20 a hearing was held to permit both parties the opportunity to formally address the issue. (R. 2).

The civilian counsel's heavy trial schedule was the basis for the continuance and it was discussed in detail. The prosecution indicated it was ready to proceed to trial and opposed any further delay. (R. 10). The government argued that witnesses had traveled and were available to testify. One witness had flown in from Washington, D.C. arriving at Norton Air Force Base, California on November 18. (R. 11). Moreover, three other witnesses previously placed on administrative hold so they could testify would suffer further inconvenience by the granting of a delay. (R. 11, 15 and 16). Another problem was that one witness expected to deliver a baby approximately three weeks later (mid-December). (R. 13). Finally, another military witness was to be married out-of-town on February 6, 1987 and would not return from her honeymoon until February 16. (R. 7-8). There was no discussion of the feasibility of proceeding either after her return on February 16 or requesting that she accommodate her travel plans after the wedding to a February 9 trial date.

Although Lieutenant Colonel Orser conscientiously articulated the correct standard for considering the con-

tinuance request and indicated his concern for protecting the appellant's rights (R. 10, 12), his final reasoning and his ruling were not specifically stated on the record. No trial date was formally set; however, the trial was reconvened on January 8, 1987. That date may have been based upon the first availability of military defense counsel (a Circuit Defense Counsel) Captain G. David Miller. (R. 29, 34).

For reasons not important to the issues presented here, Judge Orser was replaced by Judge Charles Stevenson, Jr., as the presiding military judge. (R. 30). On January 8, 1987, petitioner's military counsel renewed the delay request to permit civilian counsel to represent him (R. 33 to 37). Petitioner clearly asserted his desire to be represented by his retained civilian counsel. (R. 32) Judge Stevenson denied the request without articulating his reasoning. (R. 37). The trial proceeded without civilian counsel.

On mandatory review by the United States Air Force Court of Military Review, that court affirmed the finding of guilty but modified the sentence as to the amount of forfeitures of pay. The sentence as modified was affirmed. 27 M.J. 626 (A.F.C.M.R. 1988).

The petitioner requested a grant of review with the United States Court of Military Appeals and that court summarily granted review while affirming the decision of the United States Air Force Court of Military Review. (Appendix B).

REASONS FOR GRANTING THE WRIT

This case concerns a service-member's due process right to retain civilian counsel of his choice and have that counsel represent him at his court-martial. It also involves the special trust and confidence a service-member has for that counsel over a military counsel that is provided for

him. Ancillary to the due process issue is the military judge's responsibility to carefully balance the due process right of the service-member to have civilian counsel represent him with the military's needs to proceed expeditiously to trial. These issues are intertwined in appellant's case, although the due process issue relates to a much broader discriminatory practice, which effectively thwarts a service-member's choice of representation by civilian practitioners.

The law is clear that a criminal defendant's right to be represented by counsel of his choice is not absolute but must be balanced against society's interest in the efficient and expeditious administration of justice. *Morris* v. *Slappy*, 461 U.S. 1, 75 L.Ed. 2d. 610, 103 S.Ct. 1610 (1983); *Ungar* v. *Sarafite*, 376 U.S. 575, 11 L.Ed. 2d 921, 84 S.Ct. 841 (1964). The service has applied that doctrine to a military accused's right to retain civilian counsel. *United States* v. *Thomas*, 22 M.J. 57 (C.M.A. 1986); *United States* v. *Montoya*, 13 M.J. 268 (C.M.A. 1982) (no further delays to permit accused more time to obtain funds to retain counsel); *United States* v. *Kinard*, 21 U.S.C.M.A. 300, 45 C.M.R. 74 (1974). *See*, Art. 38(b), U.C.M.J., 10 U.S.C. §838(b).

Under the rules governing military justice, as with federal and state criminal law, a military judge is empowered to "grant a continuance to any party, and as often, as may appear just." The application must show reasonable cause. Art. 40, U.C.M.J. 10 U.S.C. §840; *Kinard, supra*, at 79. Likewise, as in state and federal practice, the granting of any application for a continuance lies within the sound discretion of the military judge. *Id.* at 80. Unless there is a clear abuse of discretion the military judge will not be overturned. *See, generally, Thomas, supra.* Motions for continuance premised on the availability of counsel fall within this rule.

This Court has stated in *Morris* v. *Slappy, supra,* at 11-12, that

> [o]nly an unreasoning and arbitrary "*insistence upon expeditiousness* in the face of justifiable delay" violates the right to counsel. (citation omitted) (emphasis supplied).

The facts of this case give rise to such a violation.

The right to be represented by civilian counsel is so important in trials by court-martial that the presiding judge has a specific obligation to insure that the accused understands that right and has a reasonable opportunity to exercise it. Rules for Courts-Martial 506, *see also* Analysis, *Manual for Courts-Martial,* (1984), Appendix 21, page A 21-27. Yet, while this Sixth Amendment right is referenced, the practicality and exercise of the right is often different. Military practice, we submit, caters to the use of detailed military counsel to represent service-members as opposed to civilian counsel.[1] This manifestation exists because of the military's combat role. It is a separate society that out of necessity may be forced, during war, to rely solely upon the military justice system (law enforcement, judicial, prosecutorial and defense functions) to deal with suspected criminal offenders. Inherent in this is the requirement to proceed to trial quickly—without delay.[2] This requirement, however,

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[1] Since 1974 the defense function has been separate and apart from local base offices and influences. In the Air Force, defense counsel are titled Area Defense Counsel or Circuit Defense Counsel. Either is detailed to represent an accused at courts-martial. Their professionalism, advocacy skills and competency are not in question. They have long provided first rate legal representation to their clients. Art. 27(b), U.C.M.J., 10 U.S.C. §827(b).

[2] E.g., in military practice, a service-member can be tried before a general court-martial five days after criminal charges have been referred to trial by the convening authority. The time limit is three days

presents abuse, as it did in petitioner's case when he chose to retain a busy civilian criminal attorney whose schedule conflicted with the trial date.

While Sixth Amendment rights to be represented by counsel are specifically explained to an accused and such rights are granted by statute and found within the articles of the Manual for Courts-Martial,[3] exercising those rights to choose a civilian counsel automatically slow the court-martial proceedings. Civilian counsel often, if not routinely, seek delays in trials. Delays, in turn, slow the pace of the military justice system. This is not to say that scheduling problems do not exist when all the parties are military. They do occur, but less frequently and for shorter durations. Military counsel are usually more readily available, and they know the time constraints and processing times the military imposes upon itself. Civilian counsel may be aware of those restraints but are also subject to time and scheduling problems caused by state and federal practice. As a consequence of these factors, court-martial continuances may be denied even when reasonable grounds are shown for a continuance.

In petitioner's case, Judge Stevenson's abrupt denial of petitioner's motion was evidence of "an unreasoning and arbitrary 'insistence upon expeditiousness' in the face of justifiable delay." *Slappy, supra* 11-12. (R. 37). Moreover, we submit that far too great an impetus is placed upon proceeding to trial quickly with military counsel and if possible without civilian counsel. Such a design preempts a service-member's right to choose and to be heard through

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for a special court-martial. During war there is no time period at all. A service-member may be brought to trial immediately under those field conditions. Rules for Courts-Martial 602, *Manual for Courts-Martial*, (1984).

[3] *See generally*, Art 38, U.C.M.J., 10 U.S.C. §838.

the counsel of his choice. That denial violates due process under the Fifth Amendment. *Chandler* v. *Fretag,* 348 U.S. 3, 99 L.Ed. 3, 75 S.Ct. 1 (1954); *Powell* v. *Alabama,* 287 U.S. 45, 68-69, 77 L.Ed. 45, 53 S.Ct. 55 (1932).

In this case, referral of the additional charges motivated petitioner to obtain the services of an experienced civilian criminal attorney. Petitioner's retained counsel diligently pursued his role as legal counsel by promptly filing his appearance and seeking a continuance so that he could represent his client. Moreover, he promptly notified the first military judge and the government of his delay request. He clearly disclosed his conflicting criminal trial calendar as the basis for the request. This application was later followed by an appearance in court to orally address the matter. Civilian counsel's original continuance sought an 81 day delay to February 9. On January 8 when Judge Stevenson summarily denied the renewed continuance request, that date was a mere thirty-one days shy of civilian counsel's date of availability to proceed to trial on February 9. Moreover, it was a total of thirty-eight days from the renewed request, that is, on February 16. The judge's decision, implementing military philosophy and practice,[4] thwarted petitioner's right to be represented by civilian counsel. Under the circumstances, he was unjustly denied due process of law.

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[4] *See, generally,* Air Force Regulation 111-1, 1 August 1984, Chapter 1, paragraph 1-3: "It is Air Force policy that all military justice procedures be done as quickly as feasible, even though statute and case law might permit greater delay." This version of Air Force Regulation 111-1 has been superseded but the policy has not been altered. *See,* Air Force Regulation 111-1, 30 September 1988, Chapter 1, paragraph 1-2.

CONCLUSION

Petitioner submits that his petition for writ of certiorari be granted in the interest of preserving a service-member's due process right to choose civilian counsel of his choice and have that trusted counsel represent him at trial.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 61381/AF
CMR Dkt. No. 26080

UNITED STATES, APPELLEE

v.

ELLIS C. STEVENS, III (422-86-8995), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review, we conclude that that decision correctly resolved the continuance issue for the reasons stated herein. 27 M.J. 626 (1988). Accordingly, it is by the Court, this 21st day of February, 1989

ORDERED:

That said petition is hereby granted on the Issue raised by appellate defense counsel; and

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (BOYLE)
Appellate Government Counsel (GIOVAGNONI)

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 26080

UNITED STATES

v.

CAPTAIN ELLIS C. STEVENS, III 422-86-8995 FV UNITED STATES AIR FORCE

Sentence Adjudged 10 Jan. 1987
Decided 17 Oct. 1988

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Major Deborah A. Baker.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Major Jeffrey H. Curtis.

Before HODGSON, FORAY and HOLTE, Appellate Military Judges.

DECISION

HODGSON, Chief Judge:

It is a fundamental principle of military due process that a servicemember be afforded a reasonable opportunity to be represented by counsel of his choice. However, the right to counsel of one's choice is not as absolute as is the

right to the assistance of counsel. *United States v. Mitchell,* 777 F.2d 248 (5th Cir.1985). Further, when a continuance is sought to retain counsel, the right to select a particular attorney must be balanced against the public's interest in the orderly administration of justice. *Urquhart v. Lockhart,* 726 F.2d 1316 (8th Cir.1984). The case before us requires that we weigh the competing interests of each side.

On 23 April 1986, the appellant was charged with two allegations of indecent assault with 16 September ultimately being set as the trial date. The defense asked for and obtained a second trial date of 9 October. However, before the trial on the initial charges began, additional allegations of rape and conduct unbecoming an officer as the result of the appellant's behavior toward the wife of an enlisted member were preferred. A third trial date was scheduled for 27 October and a fourth for 20 November.

On 14 November, the appellant retained a civilian attorney who appeared on 20 November and requested a trial delay until 9 February 1987, because an earlier trial date would conflict with his very busy law practice.* The trial judge granted a continuance until 9 January 1987, at which time the appellant renewed his request for a delay until 16 February so that his civilian counsel might represent him. The request was denied, and the trial proceeded with the appellant being defended by his appointed military counsel. Contrary to his pleas, the appellant was convicted in a bench trial of indecent assault and conduct unbecoming an officer and was acquitted of the rape allega-

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* The civilian practitioner indicated that his upcoming trial docket included approximately 11 jury trials (including three murder trials), 25 pretrial conferences, two pretrial hearings, two arraignments, two pronouncements of judgment, one civil motion hearing, seven assignment calendar calls, and one deposition.

tion. The approved sentence extends to a dismissal, confinement for 47 days, and the forfeitures of $1,627.00 per month for 12 months.

Appellate counsel argue that the appellant was denied due process when the trial judge refused to grant him a continuance that would permit his civilian counsel to represent him.

It is apparent from this transcript that the appellant sought the professional services of a busy and successful practitioner who was unavailable for employment at the time the appellant's trial was scheduled. As an attorney, this individual has the right to select or reject clients and manage his obviously busy trial docket as he sees fit, subject to the concurrence of the trial judge. The fact that an attorney is professionally engaged elsewhere does not give rise to an absolute right of a continuance and a denial of such a request "rests within the sound discretion of the military judge and will not be overturned except for a clear abuse of that discretion." *United States v. Menoken,* 14 M.J. 10 (C.M.A.1982).

Matters to be considered by the trial judge in granting or denying a continuance to resolve a scheduling conflict include the number and length of previous continuances, whether an additional continuance would inconvenience witnesses, opposing counsel or the court, and whether the delay would prejudice the accused. *United States v. Studley,* 783 F.2d 934 (9th Cir.1986); *United States v. Lambert,* 17 M.J. 773 (A.F.C.M.R.1983); *pet. denied* 18 M.J. 127 (C.M.A.1984); *see also* R.C.M. 906(b)(1). Here we note that appointed military counsel stated he was ready for trial, and his skillful and able defense of the appellant clearly indicated he was.

On the facts before us we find no basis to overturn the trial judge's ruling denying the continuance. *United States v. Garries,* 19 M.J. 845 (A.F.C.M.R.1985); *aff'd* 22 M.J.

288 (C.M.A.1986); *cert. denied* 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed.2d 578 (1987); *United States v. Lambert, supra*; *United States v. Hampton,* 50 C.M.R. 5311 (N.C.M.R.1975); *United States v. Griffiths,* 18 C.M.R. 354 (A.B.R.1955); *accord United States v. Sullivan,* 26 M.J. 442 (C.M.A.1988). The remaining assigned error is resolved against the appellant, *United States v. Higgins,* 27 M.J. 150 (C.M.A.1988).

One additional matter requires discussion. Our examination of the record discloses that the approved forfeitures are excessive. *See* Air Force Regulation 111-1, *Military Justice Guide,* para. 7-11 (1 Aug. 1984). We will correct this in our decretal paragraph.

For the reasons stated the findings of guilty and only so much of the sentence as provides for a dismissal, confinement for 47 days, and forfeiture of $1,490.00 per month for 12 months are

AFFIRMED.

Senior Judge FORAY and Judge HOLTE concur.

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